



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 3, 1997

Ms. Mary Keller  
Senior Associate Commissioner  
Legal and Compliance  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR97-2435

Dear Ms. Keller:

You have asked us to reconsider our decision in Open Records Letter No. 97-1710 (1997). We assigned your request for reconsideration ID# 109765.

You assert to this office that section 552.107(2) is applicable to documents obtained in connection with a case filed in the United States District Court of New Jersey. Section 552.107(2) provides that information is excepted from disclosure if "a court by order has prohibited disclosure of the information." In Open Records Decision No. 415 (1984) at 2, this office determined that a court order directing that settlement terms be kept confidential would protect the information from disclosure under section 552.107(2).

In Open Records Letter No. 97-1710 (1997), this office agreed that, to the extent an injunction issued by a Florida circuit court applies to the department and to certain documents held by the department, those records are confidential under section 552.107(2). However, we disagreed with your contention that section 552.107(2) also applies to documents obtained by the department in connection with the New Jersey case. You submitted to this office a "Stipulation of Confidentiality" in which the department agreed to maintain documents as confidential. We explained that governmental bodies may not enter into confidentiality agreements unless authorized to do so by statute, and that the department had not indicated that it had such authority.

You state that the New Jersey federal court entered two orders regarding documents, which provided for the handling of documents and for the disclosure of documents. You state:

Note that communications were permitted if monitored by state regulators. To be allowed access to the documents and monitor the settlement process, state regulators were required to sign the Stipulation of Confidentiality. The Stipulation of Confidentiality was drafted to comply with paragraph 7, page 4 of the pre-trial order and to

satisfy their monitoring responsibilities as described in the October 1996 order. Therefore the Annex to the Confidentiality Order signed by Catherine Reyer is in compliance with two court orders. Please note that the terms of the pre-trial order survive the "settlement, discontinuance, dismissal, severance, judgment or other disposition of . . . [the] Litigation."

As the department still has not provided information showing that it has authority to agree to keep the documents confidential, section 552.107(2) is inapplicable to these documents.

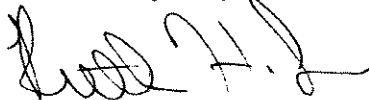
You also seek reconsideration concerning information that the department asserts is attorney work product under section 552.111. We explained that a governmental body may withhold information as attorney work product if the governmental body meets its burden of showing (1) that the information was created for civil trial or in anticipation of civil litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993) and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 (1996) at 5. In Open Records Letter No. 97-1710 (1996), this office informed you that the department had not established that the documents were prepared in anticipation of litigation. You state:

TDI contends that the opening of the case in the enforcement division satisfies both prongs of the *Brotherton* requirements. In general, cases are not opened in the Enforcement Section of Legal and Compliance, (then Market Activities) unless TDI lawyers intend to take disciplinary action against a company.

We disagree that merely showing that this case was opened by the Market Activities division satisfies the department's burden of showing the applicability of section 552.111. As the department has not provided sufficient information to show the applicability of the attorney work-product aspect of section 552.111 to the documents at issue, they may not be withheld from disclosure.

If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID# 109765

Enclosures: Submitted documents (mailed separately via Inter-Agency)

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